IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

8131 ROOSEVELT BLVD. CORP. t/a "Pinups"	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA	:	NO. 02-1392

MEMORANDUM AND ORDER

HUTTON, J. January 6, 2003

Currently, before the Court are the Defendant City of Philadelphia's Motion to Dismiss Plaintiff's Complaint and Memorandum of Law in Support thereof (Docket No. 12) and Plaintiff 8131 Roosevelt Boulevard Corporation's Memorandum in Opposition to Defendant's Motion to Dismiss (Docket No. 14), Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction (Docket No. 2) and Defendant's Response to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction (Docket No. 13).

I. BACKGROUND

From 1969 to the present, Plaintiff 8131 Roosevelt Boulevard Corporation t/a "Pinups" (hereinafter "Pinups") and its predecessors have offered adult entertainment. See Plnt. Compl. ¶ 12. Initially offering bathing suit and go-go dancing, this establishment later progressed to cabaret style adult entertainment. See 8131 Roosevelt

Corp. v. Zoning Bd. of Adjustment of the City of Philadelphia, 794 A.2d 963, 966 (Pa. Commw. Ct. 2002). By 1982, Pinups operated exclusively as an adult cabaret or "gentlemen's club." Id. at 965.

Between 1982 and 1993, Plaintiff conducted its business as an adult cabaret, receiving the requisite city permits and licenses to operate such an establishment. Id. In 1993, the City informed the prior owners of Pinups that the operation of an adult cabaret in its current location violated the 1977 zoning ordinance which regulated adult-use businesses. See Plnt. Compl. ¶ 22.

The ordinance, Section 14-1605, both defines "regulated uses,"[1] and prohibits their locating in certain parts of the city, while it permits their operation in other areas only upon receiving a "Zoning Board of Adjustment Certificate," or "variance" granted by the Zoning Board of Adjustment (hereinafter "ZBA"). See Philadelphia Code, § 14-1605. In the areas in which regulated uses may operate as a matter of right,[2] the operation of such business are conditioned upon complying with buffer zones, which are statutory minimum distances from entities such as schools, churches and other

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[1] In addition to defining "Adult Book Store," "Adult mini-motion picture theater," and "Adult motion picture theater," Section 14-1605(2)(d) defines "cabaret" as: "An adult club, restaurant, theater, hall or similar place which may or may not serve alcoholic beverages and features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators or similar entertainers exhibiting specified anatomical areas or performing specified sexual activities . . .."

[2] Section 14-1605 provides for two zoning districts where regulated uses can operate as a matter of right. The districts are the C-6 district and the "Least Restricted" (hereinafter "LR") districts. No C-6 zoning districts exists in Philadelphia.

regulated uses.[3] See Philadelphia Code, § 14-1605.

More specifically, Section 14-1605 of the Philadelphia Code prohibits "cabarets" and other "regulated uses" from operating within 500 feet of any residentially zoned district. See 8131 Roosevelt Corp., 794 A.2d at 965 n. 1. Because Pinups qualified as a "cabaret" under section 14-1605 and because Pinups was located within 500 feet of a residential area, Plaintiff required a variance from the Zoning Board in order to legally operate the premises. See Plnt. Compl. ¶ 22.

Plaintiff's predecessor sought a variance from the zoning code. Id. ¶ 23. The city issued a two-year "temporary variance." See 8131 Roosevelt Corp., 794 A.2d at 965. While this variance was effective, the business was sold to 8131 Roosevelt Corporation. The new business, headed by president Steven Tartaglia, traded under the name "Pinups" and operated as an adult cabaret. In 1996, Mr.

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[3] Section 14-1605 (4) states that no regulated use shall be permitted:

> (a) Within 1000 feet of any other existing regulated use; and/or
> (b) Within 500 feet of any residentially zoned district (regardless of the actual uses contained therein), Institutional Development District or any of the following residentially related uses:
> (.1) Churches, monasteries, chapels, synagogues, convents, rectories, religious article, religious apparel stores, residential homes, or apartment buildings, hotels or Convention/Civic center;
> (.2) Schools, up to and including twelfth grade, and their adjunct play areas;
> (.3) Public playgrounds, public swimming pools, public parks and public libraries.

Tartaglia obtained another two-year variance, permitting the legal operation of Pinups as an adult cabaret. Id. at 965.

Upon the expiration of this second two-year variance, Plaintiff filed for the "legalization" of the regulated use. See Id. On April 4, 2000, the Zoning Board denied Plaintiff's request, reasoning that Plaintiff failed to demonstrate unnecessary hardship. See id. Instead, Plaintiff applied for another temporary variance in order to continue its operation as a regulated use. See id. The Zoning Board, however, denied this last request for a variance. The Board found that the continued operation of Pinups as an adult cabaret would have a negative impact upon the public health, safety and welfare of surrounding residents. Moreover, the Department noted that while the Zoning Board had granted Plaintiff a temporary permit before, "the two-year temporary variance had expired [in 1998] . . . [rendering] the use now existing on the premises . . . in violation of the Zoning Code." Id.

Plaintiff appealed the Board's decision to the Philadelphia Court of Common Pleas, which affirmed the Board's decision. The court also sustained the Board's determination that Pinups failed to demonstrate unnecessary hardship and that the grant of a variance would be contrary to the public interest. Roosevelt Corp., 794 A.2d at 966. A Supersedeas Order was issued by the Court of Common Pleas pending appeal to the Commonwealth Court of Pennsylvania. Plaintiff appealed to the Commonwealth Court, which affirmed the Lower Court

decision. See Def. Mot. to Dismiss at 4.

In light of the Commonwealth Court's decision, the city issued a "Notice of Intent to Cease Operations." Id. This notice informed Plaintiff that the city intended to issue a "cease operations" order on March 11, 2001, unless the Commonwealth Court issued a Stay. Thereafter, the Commonwealth Court declined to enter a Stay. Plaintiff sought and was subsequently denied Supersedeas Orders from both the Pennsylvania Supreme Court and the Commonwealth Court on April 2, 2002 and April 25, 2002 respectively. Id. On March 18, 2002 the City enforced its Cease Operations Order.

On March 20, 2002, Pinups filed a complaint and request for injunctive relief from this court. On May 28, 2002, Pinups filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court.

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). Accordingly, on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court must determine whether it has authority or competence to hear and decide the case. See 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1350 at 543, 547. Unlike a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), in a motion to

dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977).

A 12(b)(1) motion may either be a facial or factual attack on subject matter jurisdiction. See Dugan v. Coastal Industries, Inc., 96 F. Supp. 2d 481, 482 (2000) Where, as here, the court must resolve a factual challenge, the court is not confined to the face of the pleadings and may properly consider matters outside the pleadings such as affidavits and other material properly before the court. See id; see also Berardi v. Swanson Mem'l Lodge No. 48 of Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir. 1990). In resolving questions concerning the court's authority to adjudicate particular cases or claims, the burden remains on the plaintiff to establish that the case is properly before the court at all stages of the litigation. Turicentro, S.A. v. Am. Airlines, Inc., 152 F. Supp. 2d 829, 831 (E.D. Pa. 2001). This burden, however, is light. Dugan, 96 F. Supp. 2d at 482. A court may only dismiss a claim for lack of jurisdiction appropriately "where the right claimed 'is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Id. at 483 (quoting Growth Horizons, Inc.,

v. Delaware Cty., Pa., 983 F.2d 1277, 1280-81 (3d Cir. 1993).

B. Federal Rule of Civil Procedure 12(b)(6)

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6), the Court must accept as true all facts alleged in the complaint and any reasonable inferences that can be drawn therefrom. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see also H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The legal standard for notice pleading under the Federal Rules is very lenient, requiring that the complaint be construed liberally in the plaintiff's favor. See Wilson v. Rackmill, 878 F.2d 772, 775 (3d Cir. 1989); Weston v. Pennsylvania, 251 F.3d 420, 429-30 (3d Cir. 2001). A court may only dismiss a complaint where plaintiff can prove no set of facts, consistent with his allegations, which justifies relief.[4] See Ala, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Crighton v. Schuylkill County, 882 F. Supp. 411, 414 (E.D. Pa. 1995).

The Federal Rules of Civil Procedure do not impose upon a Plaintiff the burden of filing detailed, factually intense pleadings on which the claim is based. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). At the same time, the court is not required to credit a Plaintiff's "bald assertions" or "legal

[4] Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

conclusions" when deciding a motion to dismiss. See Id. The Federal Rules merely require "a short and plain statement of the claim showing that the pleader is entitled to relief," enough to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2) (West 2001).

The issue before the court on a 12(b)(6) motion is not "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." John Hancock Mutual Life Insurance Co., v. King, CIV.A. No. 96-4983, 1997 WL 373512 (D.N.J. March 26, 1997); City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 (3d Cir. 1998) (holding that when deciding a 12(b)(6) motion, the court has an obligation "to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable").

III. DISCUSSION

Defendant offers two separate grounds in support of its Motion to Dismiss. First, Defendant claims that this Court lacks subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) under the Rooker-Feldman doctrine. See Def.'s Mot. to Dismiss at 6. Second, Defendant contends that Plaintiff's Complaint fails to state a claim on which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). See id. at 17. The Court will address each separate ground in turn.

A. Subject Matter Jurisdiction

1. The Rooker-Feldman Doctrine

First, Defendant urges this Court to dismiss Plaintiff's Complaint based upon the Rooker-Feldman doctrine. See Def.'s Mot. to Dismiss at 6. "The Rooker-Feldman doctrine . . . recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments . . .." Verizon Maryland, Inc. v. Public Serv. Com'n of Maryland, 535 U.S. 1753, 122 S. Ct. 1753, 1759 n.3, 152 L. Ed. 2d 871 (2002); see also In re Diet Drugs, 282 F.3d 220, 240 (3d Cir. 2002); see also Parkview Associates Partnership v. City of Lebanon, 225 F.3d 321 (3d Cir. 2000) (holding that the Rooker-Feldman doctrine is grounded in the statutory foundation of 28 U.S.C. § 1257 and the "well-settled understanding" that only the Supreme Court of the United States, may review a state court decision).[5]

In Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L.Ed. 206 (1983) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), the Supreme Court interpreted 28 U.S.C. § 1257 to mean that lower federal courts lack subject matter jurisdiction to review final

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[5] The Rooker-Feldman doctrine, which emerged from two United States Supreme Court cases, is rooted in 28 U.S.C. § 1257 that "final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court."

judgments of the highest state court. See E.B. v. Verniero, 119 F.3d 1077, 1090 (3d Cir. 1997). Since its promulgation, the Rooker-Feldman doctrine has been extended to the final decisions of lower state courts. See id. Rooker mandates that the proper avenue for a party seeking review of an adverse state court decision is through the state appellate procedure and ultimately to the Supreme Court under § 1257, not a separate federal action. See Parkview Assocs. P'ship, 225 F.3d at 324. Feldman distinguishes between general challenges to the constitutionality of a law, and challenging a particular application of that law, the latter being not subject to review by lower federal courts. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 494-85, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) (recognizing the difference between "general challenges to state bar admission rules and claims that a state court has unlawfully denied a particular applicant admission"). Id. at 485.

Under Rooker-Feldman, federal district courts do not have jurisdiction over any constitutional claims that are "inextricably intertwined" with specific claims already adjudicated in state court. Parkview Assocs. P'ship, 225 F.3d 321, 327 (3d Cir. 2000). A federal constitutional claim is "inextricably intertwined" with a state-court decision when it is so closely related to the state-court judgment that evaluating the alleged constitutional violation would essentially require the court to review the state-court

decision itself. See FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1992) (citations omitted); In re Diet Drugs, 282 F.3d at 241 ("Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling."). Specifically, "Rooker-Feldman applies only when, in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render the judgment ineffectual." FOCUS, 75 F.3d at 840.

In the instant case, Defendant contends that under the Rooker-Feldman doctrine, Plaintiff is barred from raising a constitutional challenge to the zoning ordinances because, Defendant asserts, a "ruling in [Plaintiff's] favor in this case would effectively void the decisions of the Court of Common Pleas and Commonwealth Court." See Def.'s Mot. to Dismiss at 7-8. Specifically, Defendant contends that Plaintiff's Complaint asks this Court to "overturn the findings of fact and conclusions of law of the Zoning Board, as affirmed by the state courts, that [Plaintiff] was not entitled to be recognized as a nonconforming use or granted a variance or permit to operate as an adult cabaret." Id. Accordingly, "[s]ince federal courts lack jurisdiction to review final state court judgments," Defendant concludes that Plaintiff's case should be dismissed. Id.

Plaintiff counters that the case is not barred by Rooker-Feldman for three reasons: (1) the instant case, unlike the state-court action, presents a First Amendment facial challenge to legislation; (2) neither the Court of Common Pleas nor the Commonwealth Court "considered any First Amendment challenge to the regulated use ordinance"; and (3) "resolving this claim would not require a 'reversal' of the decisions of the Pennsylvania state courts." Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 10-11.

Here, Plaintiff alleges a cause of action under 42 U.S.C. § 1983 for violation of the First Amendment right to freedom of speech. See Pl.'s Compl. at ¶ 42. The court is being asked to assess the validity of a rule[,]" Section 14-1605 of the Philadelphia Code.

The Court has original jurisdiction over Plaintiff's claim under 28 U.S.C. § 1331.

B. Failure to State a Claim

1. Claim Preclusion

Defendant further argues that Plaintiff's Complaint should be dismissed under the doctrine of res judicata, or claim preclusion. See Def.'s Mot. to Dismiss at 9. According to Defendant, Plaintiff had a "full and fair opportunity to present all of its claims, including its constitutional claims, in the Zoning Board appeal or in the trial court on review of the agency determination." Id. Since Plaintiff did not raise this First Amendment claim in the

state-court proceedings, Defendant claims that Plaintiff is barred from raising the claim now before the federal court. Id. at 9-10.

Claim preclusion, or res judicata, prohibits reexamination not only of matters actually decided in the prior case, but also those that the parties might have, but did not, assert in that action. See Parkview Assocs., 225 F.3d at 329 n.2 (citing Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1070 (3d Cir. 1990)); see also Eastern Minerals & Chem. Co. v. Mahan, 225 F.3d 330, 336 (3d Cir. 2000); Churchill v. Star Enters., 183 F.3d 184, 194 (3d Cir. 1999); Edmundson v. Borough of Kennet Square, 4 F.3d 186, 189 (3d Cir. 1993). In determining whether a federal cause of action is precluded by a prior state-court adjudication under the doctrine of claim preclusion, courts "must look to the law of the adjudicating state." Greenleaf v. Garlock, Inc., 174 F.3d 352, 357 (3d Cir. 1999); see also Parkview Assocs., 225 F.3d at 329. Therefore, this Court must apply the preclusion rules of the Commonwealth of Pennsylvania.

Under Pennsylvania law, the party asserting the defense of claim preclusion must demonstrate that the prior action and the instant action share an identity of: "(1) the thing sued on; (2) cause of action; (3) persons and parties to the action; and (4) quality or capacity of the parties suing or sued." Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988); see also Edmundson, 4 F.3d at 191-92 (citing Stevenson v. Silverman, 417 Pa. 187, 208 A.2d 786,

787-88 (1965)). The Supreme Court of Pennsylvania has barred claims under this doctrine where "'the acts complained of in both actions are identical'" likely requiring the plaintiff to "call the same witnesses and present exactly the same evidence" in the second action. Gregory, 843 F.2d at 117 (quoting Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 131 A.2d 622, cert. denied, 355 U.S. 832, 78 S. Ct. 46, 2 L. Ed. 2d 44 (1957).

The Third Circuit has applied the doctrine of claim preclusion in lawsuits, like the one at bar, brought under section 1983. See Edmundson, 4 F.3d at 191 (applying claim preclusion to the reviewed decision of Unemployment Compensation Review Board in subsequent section 1983 action); see also Brame v. Buckingham Township, CIV.A. No. 96-5821, 1997 WL 288673, at *5-6 (E.D. Pa. May 23, 1997) aff'd 149 F.3d 1163 (3d Cir. 1998) (table). The record in the instant case is not clear and conclusive. Additional discovery will aid the Court in determining this issue.

2. Procedural Due Process

Defendant next moves for dismissal of Plaintiff's claim for a violation of procedural due process under Federal Rule of Civil Procedure 12(b)(6). See Def.'s Mot. to Dismiss at 17; see also Pl.'s Compl. at ¶ 42(k). The Fourteenth Amendment provides that a state may not deprive a citizen of property without due process of law. U.S. Const. amend. XIV, § 1; see also Brown v. Muhlenberg Township, 269 F.3d 205, 213 (3d Cir. 2001). Procedural due process

ensures "the right to advance notice of significant deprivations of liberty or property and to a meaningful opportunity to be heard." Abbott v. Latshaw, 164 F.3d 141, 146 (3d Cir. 1998) (citations omitted). Accordingly, a state complies with procedural due process requirements by affording a full judicial process in which a party may challenge the administrative decision. DeBlasio v. Zoning Bd. of Adjustment for Township of West Amwell, 53 F.3d 592, 597 (3d Cir. 1995), cert. denied 516 U.S. 937 (1995); Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 682 (3d Cir. 1991), cert. denied, 503 U.S. 984 (1992); Bello v. Walker, 840 F.2d 1124, 1128 (3d Cir. 1988); cert. denied 488 U.S. 851 (1988).

In order to successfully state a claim for a deprivation of procedural due process, a plaintiff must assert that a person acting under color of state law deprived plaintiff of a protected property interest and the procedures for challenging the deprivation are inadequate. See Midnight Sessions, 945 F.2d at 680. In the instant case, Defendant moves to dismiss Plaintiff's procedural due process claim on the grounds that Plaintiff did not possess a property interest in the continued operation of an adult cabaret. See Def.'s Mot. to Dismiss at 17. According to Defendant, Pennsylvania courts have found the use illegal and "[a]s an illegal use, [Plaintiff] has no protected liberty or property interest subject to safeguards of the state or federal constitutions." Id. It is clear that Plaintiff has not been deprived of ownership of its property and

thus ownership or possession cannot form the basis for Plaintiff's alleged protected property interest. Rather, the City prohibited the use of the premises as an adult cabaret. The Pennsylvania Commonwealth Court has already concluded that Plaintiff was not entitled to a variance to operate the property as an adult cabaret and under the Full Faith and Credit principles, this Court is required to respect that determination. Moreover, even if the Court concluded that Plaintiff has a property interest in operating the property in such a manner, Plaintiff's procedural due process claim would fail nonetheless.

The undisputed evidence of record shows that the Philadelphia City Code and state law provide adequate procedures to challenge a denial of a variance. First, in Rogin v. Bensalem Township, 616 F.2d 680, 695 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981), the Third Circuit found that Pennsylvania's procedures for challenging zoning ordinances substantially conformed with the due process guidelines enunciated by the Supreme Court. Then, in Bello v. Walker, 840 F.2d 1124, 1128 (3d Cir. 1988), cert. denied 488 U.S. 851 (1988), the court reaffirmed that Pennsylvania provides adequate due process because it provides reasonable remedies to rectify a legal error by a local administrative body. Thus, "[t]he Third Circuit has conclusively held Pennsylvania's statutory scheme adequately protects the procedural due process rights of a plaintiff challenging a municipality's zoning decisions." Tri-County

Concerned Citizens Ass'n v. Carr, CIV.A. No. 98-4184, 2001 WL 1132227, at *5 (E.D. Pa. Sept. 18, 2001); see also DeBlasio, 53 F.3d at 598 n.5 ("In Rogin . . ., we upheld Pennsylvania's scheme for challenging zoning ordinances, which scheme provided for a ministerial review of a proposed use by a Zoning Officer, appeal to the Zoning Hearing Board, and appeal of that decision to the Court of Common Pleas."); Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285, 1294-95 (3d Cir. 1993), cert. denied 510 U.S. 914 (1993) (noting that Pennsylvania's scheme for challenging zoning ordinances is consistent with due process).

Plaintiff can prove no set of facts in support of his claim which would entitle relief for a violation of procedural due process, Defendant's Motion to Dismiss Plaintiff's procedural due process claim is granted and the claim is dismissed with prejudice.

3. Equal Protection and Substantive Due Process

Plaintiff also contends that section 14-1605 of the Philadelphia Code violates the Equal Protection Clause of the Fourteenth Amendment, as well as Plaintiff's substantive due process rights. See Pl.'s Compl. at ¶ 42(k), ¶ 42(n). In order to withstand scrutiny under both an equal protection and substantive due process analysis, however, a zoning ordinance need only be rationally related to a legitimate governmental interest. See Sammon v. N.J. Bd. of Med. Exam'rs, 66 F.3d 639, 645 (3d Cir. 1995); Midnight Sessions, 945 F.2d at 682; Rogin, 616 F.2d at 687; see also

Board of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 367, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (stating the "widely acknowledged tenet of [the United States Supreme Court's] equal protection jurisprudence that state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it rationally furthers the purpose identified by the State").

Whether an ordinance is rationally related to a legitimate governmental interest is a question of law for the court. Midnight Sessions, 945 F.2d at 682. To withstand scrutiny under this standard, "the law need not be in every respect consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Rogin, 616 F.2d at 689 (quoting Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88, 75 S. Ct. 461, 464, 99 L. Ed. 563 (1955)). Moreover, when applying a rational relation analysis, a court may not "second guess the legislature on the factual assumptions or policy considerations underlying the statute." Sammon, 66 F.3d at 645. Rather, the court should "defer to legislative judgments" and "not undermine the legitimacy of democratic decision making unless the local legislative judgment is without a plausible rational basis." Midnight Sessions, 945 F.2d at 682-83 (internal citations omitted).

Specifically, section 14-1605 of the Philadelphia Code was

enacted based upon legislative findings of City Council that:

> (a) There has been a recent proliferation, concentrating in certain areas of the City, of certain uses;
> (b) That the concentration of these uses causes a deleterious effect on the aesthetics and economics of the areas in which these uses are located;
> (c) That the concentration of these uses causes the areas in which these uses have located to become a focus of crime;

Philadelphia Code, § 14-1605(1)(a)-(c). In order for section 14-1605 to violate the Equal Protection Clause, there must be "no rational relationship between the disparity of treatment and some legitimate governmental purpose." Garrett, 531 U.S. at 377 (internal citations omitted); see also Dungan v. Slater, 252 F.3d 670, 674 (3d Cir. 2001). Section 14-1605 creates a distinction between classes of businesses and restricts where proprietors of adult entertainment establishments may perpetuate their trade. The Court finds, however, that the fact that section 14-1605 burdens proprietors of adult cabarets more than owners of other entertainment establishments "does not, under an equal protection analysis, vitiate either the reasonableness or the legitimacy" of the zoning restrictions. Midnight Sessions, 945 F.2d at 682.

The City has a legitimate interest in decreasing crime and preserving the character of residential neighborhoods.[6] In enacting

[6] In the instant case, rational relation scrutiny is germane to Plaintiff's equal protection and substantive due process claims and is inapposite to Plaintiff's First Amendment claim. Again, under rational relation scrutiny, the Court is not called upon to review the accuracy of City Council's conclusions in enacting section 14-1605, but rather must be deferential to their views of the situation facing the City.

section 14-1605, the City Council concluded that limiting the number of adult businesses would help achieve these legitimate governmental interests. As the United States Supreme Court recognized, "[i]t is well documented that multiple adult businesses in close proximity may change the character of a neighborhood for the worse." City of Los Angeles v. Alameda Books, Inc., 523 U.S. 425, 122 S. Ct. 1728, 1740, 152 L. Ed. 2d 670 (2002) (plurality) (Kennedy, J. concurring in judgment). Therefore, taking all facts in Plaintiff's Complaint as true and all reasonable inferences that may be drawn therefrom, the Court concludes that Plaintiff is unable to state a claim for a denial of equal protection. Accordingly, Plaintiff's equal protection claim is dismissed with prejudice.

Similarly, with regard to Plaintiff's substantive due process claim, the Court finds that City Council could have legitimately concluded that it was in the best interest of Philadelphia's "health, safety, morals and general welfare" to restrict certain adult entertainment establishments from within 500 feet of a residential area. See Rogin, 616 F.2d at 688 ("[I]t is well settled that [zoning laws] are constitutional if they bear a 'substantial relation to the public health, safety, morals, or general welfare.'"). "A violation of substantive due process rights is demonstrated if the government's actions were not rationally related to a legitimate state interest or were motivated by bias, bad faith, or improper motive." Sameric Corp., Inc. v.

Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998) (citations omitted). As noted above, the City possessed a legitimate interest in curtailing crime, preserving aesthetics and reviving the economies of certain neighborhoods and section 14-1605 is a rational method of achieving such ends. Moreover, Plaintiff's Complaint does not allege the City deliberately or arbitrarily abused its power, or that the City's actions were motivated by bias, bad faith, or improper motive. See Midnight Sessions, 945 F.2d at 683. Accordingly, Plaintiff also fails to state a claim for substantive due process violation and this claim, therefore, is dismissed with prejudice.

4. Taking Without Just Compensation

Plaintiff alleges that the City's actions against Plaintiff constitute a taking of property without just compensation. See Pl.'s Compl. at ¶ 42(j). The Fifth Amendment, made applicable to the City through the Fourteenth Amendment, "provides that 'private property [shall not] be taken for public use, without just compensation.'" Midnight Sessions, 945 F.2d at 675 (citations omitted). The Third Circuit has recognized, however, that a plaintiff does not state a cause of action for a Fifth Amendment violation when the plaintiff is not deprived of "all economically viable uses" of the property. See id. at 677. "Neither the deprivation of the most beneficial use of the land, nor a severe decrease in the value of the property will give rise to an action

for unlawful taking." King v. Township of East Lampeter, 17 F. Supp. 2d 394, 422 (E.D. Pa. 1998), aff'd 182 F.3d 903 (3d Cir. 1999) (citing U.S. v. Cent. Eureka Mining Co., 357 U.S. 155, 168, 78 S. Ct. 1097, 2 L. Ed. 2d 1228 (1958)); see also Midnight Sessions, 945 F.2d at 676 (holding that "[a] taking is not established simply upon a showing of the denial of the ability to exploit a property interest that the plaintiffs heretofore had believed was available.").

Here, the City's actions only prevent Plaintiff from operating the property as an adult cabaret. Other economically viable uses for the property are still open to Plaintiff. Therefore, accepting as true all of the factual allegations contained in the complaint, as well as the reasonable inferences that can be drawn from them, the Court concludes that since the Defendant's actions have clearly left Plaintiff with other reasonably beneficial uses for the property, Plaintiff fails to state a claim under the Fifth and Fourteenth Amendments for an unconstitutional taking. Accordingly, Defendant's Motion to Dismiss is granted as to this count.

5. First Amendment

a. Standard

Freedom of speech and expression is held out as "the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. State of Connecticut, 302 U.S. 319, 327, 58 S. Ct. 149, 82 L. Ed. 288 (1937). Whether manifested through print, video, or live

entertainment, speech containing non-obscene, sexually explicit content, is protected by the First Amendment.[7] See City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66, 101 S. Ct. 2176, 2181, 68 L. Ed. 2d 671 (1981) (holding that live nude dancing in an adult book store is afforded First amendment protection).

While it is incumbent upon the court to ensure that First Amendment guarantees are respected, it must also be recognized that the First Amendment is not an impermeable shield. One cannot simply cling to its coattails seeking redress for some alleged harm by invoking its name.[8] Certain regulations on speech are constitutionally permitted. Such regulations, however, must be drafted so as to comport with certain constitutional limits. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981). The extent to which a regulation will be tolerated, and the degree of scrutiny given a statute, depends on

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[7] This constitutional guarantee is applicable to state and local governments through the Fourteenth Amendment. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

8 See Young v. American Mini-Theater, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310 (1976) (plurality opinion). The Supreme Court stated:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.

whether the government's regulation is content-based or content-neutral. See Phillips v. Borough of Keyport, 107 F.3d 164, 172 (3d Cir. 1997) (en banc) (citing Turner Broadcasting System, Inc., v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497 (1994)).

b. Content Based or Content Neutral

When the content of speech is the impetus behind a regulation created to "suppress, disadvantage, or impose differential burdens" upon such speech, the most exacting scrutiny will be applied. Id.; see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991)(holding that if a regulation were content-based, it would be presumptively invalid and subject to strict scrutiny). In contrast, regulations unrelated to the content of speech are subject to intermediate scrutiny, as there is less risk for "excising certain ideas or viewpoints from the public dialogue." Phillips, 107 F.3d at 172 (citing Turner Broadcasting System, Inc., v. F.C.C., 512 U.S. 622 (1994)).

Plaintiff argues that Philadelphia's ordinance is a content-based regulation. It is true that Section 14-1605 targets adult entertainment businesses for specific zoning treatment. See Philadelphia Code, § 14-1605. The Supreme Court, however, has consistently found similar ordinances constitutional when aimed not at the primary effect of the speech, namely the erotic message; but

rather at the secondary effects of adult businesses on the surrounding community, "namely at crime rates, property values, and the quality of the city's neighborhoods." City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728, 1734 (2002).

To determine whether a statute capable of curtailing speech is content-based or content-neutral, courts look primarily to the government's purpose in enacting the legislation.[9] See Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).

6. TRO/Preliminary Injunctive Relief

The Third Circuit Court of Appeals has defined irreparable injury as "potential harm which cannot be redressed by a legal or

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[9] Section 14-1605 (1) states as its Legislative findings:

> (a) There has been a recent proliferation, concentrating in certain areas of the City, of certain uses;
> (b) That the concentration of these uses causes a deleterious effect on the aesthetics and economics of the areas in which these uses are located;
> (c) That the concentration of these uses causes the areas in which these uses have located to become a focus of crime;
> (d) In order to prevent the further deterioration of communities and neighborhoods in the City of Philadelphia, and to provide for the orderly, planned future development of the City, that in addition to existing zoning regulations, certain additional special regulations are necessary to insure that these adverse effects will not continue to contribute to the blighting or downgrading of surrounding neighborhoods; and,
> (e) For the purposes of controlling the concentration of certain uses, special regulations relating to the location of these uses are necessary.

equitable remedy following a trial." Instant Air Freight, 882 F.2d at 801. The Third Circuit has stated:

> "It seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. . . . They key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough."

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

8131 ROOSEVELT BLVD. CORP. t/a "Pinups"	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA	:	NO. 02-1392

O R D E R

AND NOW, this 6th day of January, 2003, upon consideration of Defendant City of Philadelphia's Motion to Dismiss Plaintiff's Complaint and memorandum of Law in Support thereof (Docket No. 12) and Plaintiff 8131 Roosevelt Boulevard Corporation's Memorandum in Opposition (Docket No. 14), IT IS HEREBY ORDERED that:

1. Defendant's Motion to Dismiss Plaintiff's claims for violation of (a) procedural due process; (b) substantive due process; (c) equal protection; and (d) taking without just compensation is **GRANTED;**

2. Plaintiff's claim that Section 14-1605 of the Philadelphia Code unreasonably restricts protected expression under the First Amendment is not dismissed. A discovery scheduling order shall issue forthwith; and

3. Plaintiff’s Motion for a Temporary Restraining Order and/or Preliminary Injunction is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.